87-480

Supreme Court, U.S.
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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

SHERIFF JACK HEARD,
*Petitioner*

v.

MILLICENT CURRY,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

Rule 4, Federal Rules of Civil Procedure, was amended in January, 1983 (effective February 26, 1983), to provide that summons and complaint must be served within 120 days of filing. The questions presented are as follows:

(1) In cases brought under 42 U.S.C. § 1983 and the "borrowing" of state statutes of limitations, was Plaintiff's suit barred by the Texas two-year statute of limitations when Plaintiff failed to serve summons, complaint and acknowledgement of service during the 120-days provided by Rule 4 and when, without any service made, the case was dismissed for want of prosecution approximately seven months after it was filed?

(2) In cases brought under 42 U.S.C. § 1983, must a Plaintiff file suit and seek service within 120 days of filing to toll the borrowed state statute of limitations?

## PARTIES TO THIS PROCEEDING

The parties to this proceeding are those named in the caption. Named but not cited as defendants in the trial court were (as named in Plaintiff's Original Complaint): "Deputy Miller," Deputy Labove," "Dr. Adams." They did not appear in the appellate court.

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SHERIFF JACK HEARD,
*Petitioner*

v.

MILLICENT CURRY,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Sheriff Jack Heard respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 819 F.2d 130 (App. B, *infra,* 6a). The panel opinion on Petition for Rehearing (App. C, *infra,* 13a) is not yet reported. The Judgments and Orders of Dismissal from the Trial Court (App. E, *infra,* 21a; App. F, *infra,* 24a) are not reported.

## JURISDICTION

The opinion of the Fifth Circuit Court of Appeals, sought to be reviewed, was rendered on June 16, 1987. The panel decision on the Petition for Rehearing was filed July 23, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND RULE INVOLVED

The Civil Rights Act of 1871 (42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, of the district of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Relevant portions of Rule 4, Federal Rules of Civil Procedure, are contained in Appendix A, *infra,* 1a.

## STATEMENT OF THE CASE

Rule 4(j) of the Federal Rules of Civil Procedure was amended in January, 1983, to require a party filing suit serve summons and complaint upon the defendant within 120 days or face dismissal. Rule 4(c)(2)(C)(ii) requires service by summons, complaint and Form 18-A; if there is no answer, personal service must be made.

On September 2, 1983, (a few days before limitations had run) Plaintiff filed her suit under 42 U.S.C. § 1983, alleging that on or about September 14, 1981, Sheriff Jack Heard and a Deputy Sheriff violated her civil rights.

Plaintiff's suit was assigned cause number H-83-5283. During the pendency of H-83-5283, however, Plaintiff never sought a summons and never served either defendant (*See* App. D, 17a). Approximately seven months later, on March 29, 1984, the court dismissed Plaintiff's cause for want of prosecution, because of Plaintiff's failure to comply with Rule 4(j) (App. F, 24a). Upon Plaintiff's motion, the trial court reinstated the case to the docket on May 9, 1984 (App. D, 17a, entry 4). Plaintiff next sought default judgment against Petitioner Heard and his co-defendant (App. D, 17a, entry 5). The trial court issued its show cause order to Petitioner Heard; Sheriff Heard responded by challenge to the court's *in personam* jurisdiction over him and by urging dismissal of the cause based on the expiration of Texas two-year statute of limitations applicable to 42 U.S.C. § 1983 (App. G, 26a). The court dismissed the cause on Petitioner's grounds (App. E, 21a).

Respondent Curry appealed to the Court of Appeals for the Fifth Circuit, arguing that mere filing of her lawsuit tolled the Texas limitations statute. The Court of Appeals agreed, vacating and remanding to the trial court (App. B, 6a). Petitioner Heard sought rehearing of the panel decision on the basis that the Court of Appeals failed to consider the effect of dismissal seven months after filing. The petition for rehearing was denied without further opinion (App. C, 13a).

## REASONS FOR GRANTING OF THE WRIT

This case presents an important question as to the construction of Rule 4 of the Federal Rules of Civil Procedure, reinstatement of the case (dismissed 41 days earlier) and the borrowed state statute of limitations in

42 U.S.C. § 1983 actions. The application of these principles involves cases which are dismissed for failing to serve a defendant at *any* time during the pendency of the cause and, further, in which a Plaintiff never filed a motion to enlarge time to serve. In this cause, Plaintiff's explanation of such failure to seek and mail the summons with complaint and an Acknowledgement of Service form was "inadvertence." Inadvertence does not comply with Rule 4(c)(2)(C)(ii), Fed. R. Civ. Proc. Also, Plaintiff was on notice of lack of service by virtue of the order of dismissal on March 29, 1984.

The Fifth Circuit Court of Appeals, in its opinion, states that Texas' two-year statute of limitations tolling provisions are invoked when the Plaintiff files a petition (or complaint) in the clerk's office and citation, issued by that clerk and accompanying the petition, is served by an authorized officer (App. B, 8a, 9a). Specifically, the Texas tolling provisions apply when the Plaintiff uses "due diligence" in procuring the issuance of citation although it is served after the period of limitation. (App., *Id.*). This cause was dismissed for want of prosecution because no service was ever made within the approximately *seven* months the case was on file in the district court before dismissal or after reinstatement. In reaching its decision, the Fifth Circuit disregarded Texas court holdings that 6½ months between filing and service, as a matter of law, established lack of due diligence and failed to toll the limitation period, *Hamilton v. Goodson,* 578 S.W.2d 448 (Tex. Civ. App.—Houston [1st Dist.], 1979, no writ); *Buie v. Couch,* 126 S.W.2d 565 (Tex. Civ. App.—Waco 1939, writ ref'd) [8⅓ months between filing and service was, as a matter of law, not due diligence and limitations not tolled.]

Although a suit in federal court is "commenced" when filed, this Court has held that federal rules of civil procedure governing commencement were not intended to displace state tolling rules for purposes of state statutes of limitation. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). Because there is no federal statute of limitations, federal courts "borrow" the applicable limitations statutes of the state in which they sit. *Runyon v. McCrary*, 427 U.S. 160, 180-182 (1976). (Not at issue in this cause is whether the trial court applied correctly the Texas two-year—as opposed to the one-year—statute of limitations.)

Thus, under federal application of state law, when a suit is subsequently dismissed, as in this cause, the statute of limitations was *not tolled* by the filing on the complaint; the original complaint is treated as if it were never filed. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976); *Cardio-Medical Assoc. v. Crozier-Chester Med. Ctr.*, 721 F.2d 68, 77 (3rd Cir. 1983); 2 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 4.46 at 4-574 (2d ed. 1985). When the limitations period has run, Plaintiff's right to secure proper service, by filing enlargement motion or amendment to defective service, should be denied as being an exercise in futility. *Smith v. Boyer*, 442 F. Supp. 62 (D.C. N.Y. 1977).

The Rule 4(j) Fed. R. Civ. Proc., provision of 120-days for service does not add an additional 120 days to the state statute of limitations. *Moore v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984). Rule 4(j), Fed. R. Civ. Proc., mandates dismissal when service has not been made within 120 days and "good cause" to extend time for service does not exist. *Norlock v. City of Garland*, 768 F.2d 654 (5th Cir. 1985). "Good cause"

has been defined as more than "simple inadvertence or mistake of counsel or ignorance of the rules." *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304 (5th Cir. 1985). There must be a showing of "good faith" by Plaintiff; that is, a Plaintiff must show some reasonable basis for noncompliance within the time specified for service. *Winters v. Teledyne, citing* 10 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: Civil § 1165 at 622; *Wei v. State of Hawaii*, 763 F.2d 370 (9th Cir. 1985). The trial court below held that Plaintiff failed to show such good cause because she failed to exercise "due diligence" in service of summons, complaint and Acknowledgement of Summons. Because federal courts are courts of limited jurisdiction, the burden is on the Plaintiff to establish that jurisdiction. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974). Unless a defendant waives defective service or makes a voluntary appearance, the federal court has no jurisdiction to render judgment against that defendant, regardless of that defendant's actual notice of suit. *Sieg v. Karnes*, 693 F.2d 803 (8th Cir. 1982); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *Ransom v. Brennan*, 437 F.2d 513 (5th Cir. 1971), *cert. denied*, 403 U.S. 904.

The fact the trial court reinstated the cause in May, 1984, does not "cure" the Plaintiff's limitations problem. If the filing of the cause tolled the state limitations statute, its subsequent dismissal effectively caused the statute of limitations to continue. Once the limitations period had expired, the trial court could not "undo" that expiration by reinstatement. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); 2 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 4.46 at 4-574 (2d ed. 1985)

Rule 4, Fed. R. Civ. Proc., is very clear as to what is required to bring a defendant into court and the time in

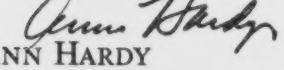
which a Plaintiff is to act. The effect of allowing the opinion of the court of appeals to stand is to abrogate the 120-day service provision specifically added to Rule 4 in 1983 and return Rule 4 prior to its 1983 enactment. Further, the appellate court's decision's effect would abrogate Rule 4 and case law requirements of necessity of a summons. In other words, a Plaintiff, under these facts, could take default against a defendant without that defendant ever being afforded his Due Process "day in court."

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MIKE DRISCOLL
Harris County Attorney
Harris County, Texas



ANN HARDY
Assistant County Attorney
Harris County, Texas

*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of September, 1987, a true and correct copy of Sheriff Jack Heard's Petition for Writ of Certiorari was mailed, proper postage prepaid, to Respondent's (Plaintiff below) counsel of record below, Ms. Jacqueline Taylor, Two Houston Center, 909 Fannin, Suite 2600, Houston, Texas 77010-1003.

Ann Hardy

ANN HARDY
Assistant County Attorney

# APPENDICES

# APPENDIX A

## RULES OF CIVIL PROCEDURE

Rule 4. *Process*

(a) *Summons: Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendant.

(b) *Same: Form.* The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) *Service.*

(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.

(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this para-

graph, be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only—

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming sub-

stantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.

(d) *Summons and Complaint: Person to be Served.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age

and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

* * *

(h) *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

* * *

(j) *Summons: Time Limit for Service.* If a service of summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

* * *

## APPENDIX B

Millicent CURRY,
Plaintiff-Appellant,

v.

Sheriff Jack HEARD, et al.,
Defendants-Appellees.

No. 86-6005

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 16, 1987.

Former inmate filed complaint against sheriff who had allegedly failed to provide reasonable medical assistance and facilities in light of her pregnancy at that time. The United States District Court for the Southern District of Texas, David Hittner, J., dismissed complaint. On appeal, the Court of Appeals, Johnson, Circuit Judge, held that timely service of complaint, although defective for lack of summons, tolled statute of limitations under Texas law and process could thus be amended to cure defect even though limitations period had run.

Vacated and remanded.

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Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiff Millicent Curry appeals from the district court's dismissal of her complaint. We vacate the district court's judgment and remand.

## I. *Facts and Procedural History*

In her complaint, plaintiff Millicent Curry alleges that she was an inmate in the central jail for Harris County, Texas, beginning about September 14, 1981. She alleges that she was pregnant at that time and that the failure to provide reasonable medical assistance and other conditions in the jail caused her to lose her baby, among other injuries.

Curry filed her complaint in federal district court on September 2, 1983. At the same time, early September 1983, in apparent reliance on Federal Rule of Civil Procedure 4(c)(2)(C)(ii),[1] Curry mailed a copy of the complaint to defendant Sheriff Heard of Harris County. Curry neglected to include a summons in her mailing to Sheriff Heard. Noting the absence of a summons, Sheriff Heard did not respond.

Curry, apparently still unaware of the missing summons, wrote to Sheriff Heard, asking whether his failure to file an answer was due to mistake or oversight on his part. She received no response. Eventually, Curry moved the

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1. The Rule provides:

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

. . .

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served.

. . .

district court for entry of a default judgment, and the district court ordered Sheriff Heard to show cause why the court should not grant Curry's motion. In response, Sheriff Heard complained that Curry had failed to mail a summons to him along with the complaint. Curry, realizing her omission, then requested that the district court amend process pursuant to Federal Rule 4(h).[2]

The district court instead ordered that Curry's complaint be dismissed. Applying the Texas two-year statute of limitations[3] and the Texas equitable doctrine of tolling, the district court determined that the period of limitation had run. The court ruled that, because Curry's claims were time-barred, amendment of process under Federal Rule 4(h) would be futile. Curry appeals.

## II. *Discussion*

This case requires the application and adaption of Texas tolling doctrine, developed in the context of Texas court procedure, to the context of federal court procedure.

In order to toll the Texas statute of limitations, two requirements must generally be met within the period of limitation: (1) The plaintiff's petition (or complaint)

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2. The Rule provides:

> At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

3. Texas Rev. Civ. Stat. Ann. art. 5526 (Vernon 1958, 5th reprint 1979) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986)) provides:

> There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description. . . .

must be filed in the office of the clerk, and (2) a citation which "shall be accompanied by a copy of plaintiff's petition,"[4] must be issued by the clerk and served upon the defendant by an authorized officer.[5] *See Liles v. Phillips,* 677 S.W.2d 802, 808-09 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *Roper v. Jeoffroy Mfg., Inc.,* 535 S.W.2d 706, 707 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).

Under the Texas equitable doctrine of tolling, the above tolling rule is satisfied alone by filing the petition within the period of limitation so long as the plaintiff approximates the rule's second requirement by using "diligence in procuring the issuance and service of citation," even though the citation is in fact first issued and served after the period of limitation. *Rigo Manufacturing Co. v. Thomas,* 458 S.W.2d 180, 182 (Tex. 1970); *see also Zale Corp. v. Rosenbaum,* 520 S.W.2d 889, 890 (Tex. 1975); *City of Gainesville v. Harder,* 139 Tex. 155, 162 S.W.2d 93, 95 (1942).

In the present case, the district court implicitly held that the statute of limitations was not tolled by the September 1983 filing of Curry's complaint and service of process under Federal Rule 4(c)(2)(C)(ii) because a summons was missing from that service of process. The district court explicitly held that the statute was not tolled under the Texas equitable doctrine of tolling because "Plaintiff did not exercise diligence to secure the necessary summons to effectuate proper service of process."

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4. Tex. R. Civ. P. 101.

5. *See* Tex. R. Civ. P. 103.

Curry relies upon *Fluor Engineers and Constructors, Inc. v. Southern Pacific Transportation Co.*, 753 F.2d 444 (5th Cir. 1985), in urging a contrary result. In *Fluor,* one defendant, the Southern Pacific, in its answer to the plaintiff's complaint, had asserted a cross-claim against another defendant, the Norfolk & Western. The Southern Pacific's answer had been filed within the Texas period of limitation applicable to its cross-claim against the Norfolk & Western. 753 F.2d at 447. Thus, the first requirement—filing within the period—for tolling the statute of limitations had been met. The second requirement, however, had not been met because the Southern Pacific had first served the cross-claim upon the Norfolk & Western after the period of limitation. Moreover, this postperiod service of process had been without a summons. *Id.*

Nevertheless, the district court in *Fluor* had found that the Southern Pacific's postperiod service of process, though defective for lack of a summons, had been diligent. In an alternate holding, this Court ruled that the diligent, though defective, postperiod service of process, together with the in-period filing of the complaint, satisfied the Texas equitable doctrine of tolling. *Id.* at 449 n. 6. On the other hand, the defect in the service of process could be cured by amendment pursuant to Federal Rule 4(h). *Id.* at 449-50.

If postperiod, albeit defective service of process will, with equity's helping hand, satisfy the tolling rule's second requirement then the instant in-period service of process bearing that same defect must satisfy the tolling rule even without equity's assistance. It must be remembered that equity cured the deficient timing of service of

process, not the defect in that service, in *Fluor*. The Rule 4(h) amendment cured the defect. On the other hand, the instant service of process labors under no deficiency of timing.

This resolution of the present tolling question is reasonable from another perspective. The *Fluor* opinion equates in-period service of process—not just service of a summons—under the Federal Rules with the tolling rule's requirement of in-period issuance and service of citation under the Texas Rule. *See id.* at 449 n. 6.[6] Under the Texas Rules, unless a citation is issued and served, the defendant in most cases is unlikely to receive notice of the plaintiff's petition. This is so because the petition reaches the defendant's hands by accompanying the citation, and service of the citation is generally entrusted to an authorized officer.[7] Without a citation an officer has no occasion to serve the petition. Thus, the Texas courts, when they speak of the tolling rule's second requirement, understandably speak of the issuance and service of a citation. Under the Federal Rules, service of process may be entrusted to a party. That party may well serve, as did Curry, a copy of the complaint upon an opposing party, even though the serving party has neglected to have issued and to serve a summons. When that happens, it seems reasonable to say that the in-period service of process, though defective for lack of a summons, satisfies the tolling rule's requirement of in-period issuance and

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6. Indeed, not all the Texas cases speak of the service of citation, but more generally of service of process. *E.g., First State Bank & Trust Co. v. Ramirez,* 133 Tex. 178, 126 S.W.2d 16, 18 (Comm'n App. 1939).

7. *See supra* slip opinion at 4580, p. ___ & n. 5; *see also* 2 R.W. McDonald & F. W. Elliot, Texas Civil Practice in District and County Courts § 9.11, at 350-51 (1982 rev.).

service of a citation.[8] Of course, the action may not proceed unless that defect is somehow cured, but the statute of limitations has been tolled.

III. *Conclusion*

Having cleared away the district court's time-bar and, with it, the futility impediment to consideration of Curry's motion for Rule 4(h) amendment, we vacate the district court's judgment and remand for consideration of that motion and further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

8. *Cf. Ley v. Ley,* 62 S.W.2d 503, 505 (Tex. Civ. App.—Galveston 1933, writ dism'd w.o.j.) (requiring, not issuance and service of citation, but notice to defendant); *see generally Price v. Estate of Anderson,* 522 S.W.2d 690, 692 (Tex. 1975); *Castro v. Harris County,* 663 S.W.2d 502, 505-06 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd w.o.j.); *Buie v. Couch,* 126 S.W.2d 565, 566 (Tex. Civ. App.—Waco 1939, writ ref'd).

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 86-6005

---

MILLICENT CURRY,
Plaintiff-Appellant,

v.

SHERIFF JACK HEARD, DEPUTY LABOVE,
DEPUTY MILLER and DR. ADAMS,
Defendants-Appellees.

---

Appeal from the United States District Court for the
Southern District of Texas

---

ON PETITION FOR REHEARING

(July 23, 1987)

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge

7-20-87

CLERK'S NOTE:

SEE FRAP AND LOCAL RULE 41 FOR STAY OF THE MANDATE.

**APPENDIX D**

CLERK'S DOCKET ENTRIES

NO. H-83-5283

JURY REQUESTED

CLOSED 3-29-84

REINSTATED 5-9-84

CLOSED 11-6-86

MILLICENT CURRY,
Plaintiff

v.

SHERIFF JACK HEARD
DEPUTY LABOVE
DEPUTY MILLER
DR. ADAMS
Defendants

LINUS OWENS
Intervenor

HITTNER
Judge

CAUSE

28 U.S.C. § 1331 and 1343, Negligent medical attention while incarcerated $1,000,000.00

ATTORNEYS

Jacqueline Taylor, Atty in Charge
2100 Travis, Suite 1200
Houston, Texas 77002
951-0152

Deft. Heard:

Ann Hardy
Asst. County Atty
1001 Preston, Suite 634
Houston, TX 77002

Intervenor:

Ray L. Shackelford
EVANS, SHACKELFORD & ASSOCIATES, P.C.
2040 Lyric Office Centre
440 Louisiana, Box 182
Houston, TX 77002
(713) 224-8666

| Date | NR. | Proceedings |
|---|---|---|
| 9- 2-83 | 1 | ORIGINAL COMPLAINT, filed. (No request for service at this time). A Jury Trial is Demanded. |
| 3-29-84 | 2 | (JVS) ORDER OF DISMISSAL, filed. Parties ntfd. r.j Case DISMISSED w/o prejudice for want of prosecution. |
| 4- 4-84 | 3 | Pltf's MOTION TO REINSTATE, filed. (No Statement) rj Dkt'd 4-5-84. |
| 5- 9-84 | 4 | (JVS) ORDER, filed. Parties ntfd. rj Case is REINSTATED. Dkt'd 5-10-84. |
| 7-20-84 | 5 | Pltf's APPLICATION & NOTICE FOR ENTRY OF DEFAULT JUDGMENT against Sheriff Jack Heard, filed. rj M/D Aug. 13, 1984 by Clerk. Dkt'd 7-26-84. |
| 10-25-84 | 6 | (JVS) *ORDER TO SHOW CAUSE,* filed. parties ntfd. fs dkt'd 10-26-84. Re: Pltf's Motion for Default Judgment— Parties to appear on Dec. 13, 84 at 9:30 a.m. for show cause hearing, and shall file a written response to the Motion w/in (15) days of service of this Order. (Deft. to be served by registered mail and by regular mail). |
| 11-13-84 | 7 | Deft Heard's RESPONSE to Court's Order to Show Cause dated 10-25-84, filed. dm Dkt'd 11-15-84. |
| 11-28-84 | 8 | Deft A.M. Labove's RESPONSE to the Court's Order to Show Cause dated Oct. 25, 84. filed. fs Dkt'd 11-30-84. |

| Date | NR. | Proceedings |
|---|---|---|
| 12-11-84 | 9 | Pltf's RESPONSE to deft's response to court's order to Show Cause, filed. dm Dkt'd 12-12-84 |
| 12-13-84 | | Jacqueline Taylor, atty f/pltf & Ann Hardy, atty f/defts Heard & LaBove apprd for show cause hearing. Advised parties that the matter will be reset. Defts Miller & Adams did not appear, however, pltf will move to dismiss. Atty for Defts requested an oral hearing on pltfs motion. dc/dm Dkt'd 12-18-84. |
| 8-26-85 | 10 | Pltf's AMENDED RESPONSE TO DEFT'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE, filed. wl |
| 10-11-85 | | Rtn'd Linus Owens' MOTION TO INTERVENE, due to non-compliance w/ L.R. 14. (no stmnt of opp./non-opp.) wl |
| 10-29-85 | 11 | Linus Owens' MOTION TO INTERVENE, filed. (Unopposed) wl Dkt'd 10-30-85 |
| 11- 1-85 | 12 | (JVS) ORDER, filed. Parties ntfd. wl Linus Owens is GRANTED leave to Intervene. Dkt'd 11-4-85. |
| 11- 1-85 | 13 | INTERVENOR'S COMPLAINT of Linus Owens, filed. wl Dkt'd 11-4-85. |
| 11-25-85 | | Rec'd ltr from pltf counsel re: Request for hearing date, fwd to CRD. wl Dkt'd 11-27-85. |

| Date | NR. | Proceedings |
|---|---|---|
| 5- 6-86 | 14 | (JVS) NOTICE, filed, parties ntfd. mb/ wl This case is set for a MOTION & SCHEDULING CONF on Jun 16, 1986, at 9:30 a.m. Dkt'd 5-13-86. |
| 6-11-86 | | Conference set for 6-15-86 cancelled. Parties ntfd by telephone. To be reset at a later date. mb/db Dkt'd 6-18-86. |
| 7-01-86 | | Per JVS Revised Division of Business Order of 6-12-86, this case is TRANSFERRED to the docket of Judge Hittner effective 7-01-86 in order to equalize cases pending among all judges. db Dkt'd 7-24-86. |
| 8- 7-86 | 15 | Pltf's AMENDED RESPONSE to deft's Response to the Court's Order to Show Cause, filed, jgm Dkt'd 8-8-86. |
| 8-19-86 | | SHOW CAUSE HEARING scheduled for Oct. 17, 1986 at 10:00 a.m., parties ntf jgm, pjn. |
| 8-25-86 | 16 | Deft's RESPONSE to the Court's Request for Written Status Report, filed. jgm |
| 9-25-86 | 17 | Pltf's STATUS REPORT, filed. jgm Dkt'd 9-20-86. |
| 10-31-86 | 18 | (DH) SHOW CAUSE HEARING, filed. jgm RPTR-G. Dye Appearances: J. Taylor f/pltf. A. Hardy f/deft; Motion for Default Judgment under consideration by court, court adjourned 3:05 p.m., filed. jgm Dkt'd 11-7-86. |

| Date | NR. | Proceedings |
|---|---|---|
| 11- 6-86 | 19 | (DH) ORDER OF DISMISSAL, filed. parties ntfd. jgm. Pltf's complaint against all named defts be dismissed pursuant to F.R.C.P. 12(b)(5). Dkt'd 11-7-86. |
| 11- 6-86 | 20 | (DH) FINAL JUDGMENT, filed. jgm. parties ntfd. Case is dismissed pursuant to F.R.C.P. 12(b)(5). Dkt'd 11-7-86. |
| 11- 7-86 | | Rec'd Sites from Texas Supreme Court sent in by J. Taylor, fwded to file, jgm |
| 11- 7-86 | | Rec'd Sites from Federal Reporter, sent in by J. Taylor, fwded to file, jgm |
| 12- 4-86 | 21 | Pltf. NOTICE OF APPEAL to Order of Dismissal entered Nov. 6, 1986, filed. Dkt'd 12-10-86. mac |
| 12- 4-86 | | Filing & Docketing Fees both paid. (Rcpt. #263836) mac |
| 12-17-86 | 22 | Pltf. TRANSCRIPT ORDER FORM advising that the estimated completion date for filing the transcript is Dec. 22, 1986, filed. mac |
| 12-22-86 | 23 | Court Reporter's TRANSCRIPT OF PROCEEDINGS on Oct. 31, 1986, filed. (1 Vol.) Pd. 1-5-87 and Rec. & Dkt'd 1-6-87. mac |
| 1- 8-87 | | RECORD ON APPEAL consisting of All Original Papers (1 Vol.) and Transcript (1 Vol.) forward to Court of Appeals. mac |

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-5283

MILLICENT CURRY,
Plaintiff,

v.

SHERIFF JACK HEARD, et al.,
Defendant.

(Filed November 6, 1986)

FINAL JUDGMENT

This Court entered an order of Dismissal pursuant to Fed. R. Civ. P. 12(b)(5) this same day.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 6th day of November, 1986.

/s/ DAVID HITTNER
David Hittner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-5283

MILLICENT CURRY,
Plaintiff,

v.

SHERIFF JACK HEARD, et al.,
Defendant.

(Filed November 6, 1986)

ORDER OF DISMISSAL

Came on to be heard Plaintiff's Motion for Entry of Default Judgment. Defense Counsel appeared in response to this Court's Order to Show Cause why default should not be granted against him; and the Court, after reviewing the papers on file with the district clerk and hearing the argument of Plaintiff's and Defendants' counsel, is of the opinion that Plaintiff's motion should be denied on the ground that this Court never acquired personal jurisdiction over any named Defendant in this suit. Fed. R. Civ. P. 12(b)(5). Amendment of process via Fed. R. Civ. P. 4(h) would be fruitless because Plaintiff's claim is barred by the applicable two-year Texas Statute of Limitations. This Court finds that Plaintiff did not exercise diligence to secure the necessary summons to effectuate proper service of process which would toll the

statute of limitations. *Zale Corp. v. Rosenbaum,* 520 S.W.2d 889, 890 (Tex. 1975). Therefore, it is

ORDERED that Plaintiff's complaint against all named Defendants be dismissed pursuant to Fed. R. Civ. P. 12(b)(5).

SIGNED at Houston, Texas, on this 6th day of November, 1986.

/s/ DAVID HITTNER
David Hittner
United States District Judge

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-5283

MILLICENT CURRY

v.

SHERIFF JACK HEARD, ET AL

(Filed March 29, 1984)

ORDER OF DISMISSAL

It has come to the attention of this Court that service of this action, filed on September 2, 1983, has not been effected within 120 days of the filing of the complaint. Federal Rules of Civil Procedure 4(j) provides in part:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. . . ."

In accordance with this Rule, it is

ORDERED, ADJUDGED and DECREED that this action be DISMISSED without prejudice for want of prosecution.

DONE at Houston, Texas, this 29th day of March, 1984.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-83-5283

MILLICENT CURRY

v.

SHERIFF JACK HEARD, et al.

(Filed November 13, 1984)

### RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE DATED OCT. 25, 1984

Comes now Ann Hardy, Assistant County Attorney for Harris County, Texas, in behalf of Sheriff Heard, named but unserved defendant in the above styled and numbered cause, showing as follows:

(1) This court does not have personal jurisdiction over Putative Defendant Heard for the purpose of granting a default judgment against him in this cause. Plaintiff never sought summons in this cause; no summons was issued and no service has been had on Putative Defendant Heard.

(2) Local Rule 10(B) (effective July 1, 1983) provides that amended Rule 4, F.R.C.P., "will be strictly followed, except that the Clerk will not be required to issue summons upon the filing of a complaint under Rule 4(a), Federal Rules of Civil Procedure, in any civil action until the Attorney in Charge . . . has sub-

mitted to the Clerk properly completed summons forms . . . together with sufficient copies for service."

The Court's docket sheet and the Civil Cover Sheet each indicate that Plaintiff's counsel did not request summons and that no summons was issued by the Clerk.

(3) Rule 4, F.R.C.P., was amended on January 12, 1983, effective 45 days thereafter. The amendment provided for Form 18-A, "Notice and Acknowledgment for Service By Mail" (see attached Exhibit "2"), to be completed by the defendant upon service. The first paragraph of the form provides that the summons *and* complaint accompany Form 18-A, to be served according to Rule 4(c)(2)(C)(ii), F.R.C.P.

Putative Defendant Sheriff Heard did not receive a summons or a Form 18-A acknowledgment (see Affidavit of Sheriff Heard, attached as Exhibit "1").

(4) According to the defense counsel's records, Plaintiff's counsel mailed a copy of the complaint to Sheriff Heard; it was received by him on September 6, 1983. The complaint was received without summons, Form 18-A or other attorney-drafted proof of service attached. Upon receipt of the complaint, Sheriff Heard forwarded the copy to defense counsel; counsel called the federal deputy district court clerk and asked if proof of service had been filed. The federal deputy district clerk advised counsel *no summons* had been issued and *no service* proof had been made or filed with the court.

Sheriff Heard received a second copy of the complaint and a letter, dated April 3, 1984, from Plaintiff's counsel. Again, *no summons* or Form 18-A was attached to the complaint. Sheriff Heard forwarded Plaintiff's counsel's

letter and complaint to the undersigned defense counsel who again called the federal docket clerk. Docket clerk Jones advised counsel that: (1) suit was filed on September 9, 1983, and no summons or service was requested at that time; (2) no summons had been requested since that date; (3) the case was dismissed on March 29, 1984, (5 days before Plaintiff's counsel's letter to Sheriff Heard), without prejudice for want of prosecution; and (4) the case was closed.

(5) Putative Defendant Sheriff Heard would show that the docket sheet reflects the above facts and that he has received no communications, complaints or summons other than the two complaints (see Affidavit of Sheriff Heard, Exhibit "1"), counsel's April 3, 1984 letter, and the court's Order to Show Cause, dated October 25, 1984.

(6) Rule 4(a), F.R.C.P., provides that the clerk shall "forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint."

(7) Rule 4(b), F.R.C.P., provides that "The summons shall be signed by the clerk, be under the seal of the court, contain the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney . . . and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him. . . ." Commentaries to Rules of Civil Procedure, U.S.C.A., C4-9 (Sup. at 27); C4-10 (Sup. at 27); C4-19 (Sup. at 35).

(8) Rule 4(d), F.R.C.P., provides that "The summons and complaint shall be served together." Subsection (1)

of Rule 4(d) provides that service is made upon an individual "by delivering a copy of the summons *and* of the complaint" to the defendant. Commentaries to Rules of Civil Procedure, U.S.C.A., C4-21 (Sup. at 38-39).

(9) Rule 4(j), F.R.C.P., states that if service "of summons and complaint" is not made upon a defendant "within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice. . . ." This cause was dismissed for want of prosecution on March 29, 1984 —more than six months after filing.

(10) In Plaintiff's Motion to Reinstate, counsel made her affidavit that Putative Defendant Sheriff Heard was "served with process by certified mail. . . ." The court's file, however, does not show counsel filed with the clerk either the Acknowledgment of Service or summons, showing date served, as required by Rule 4(g), F.R.C.P.

(11) Plaintiff's Motion for Entry of Default is supported by Plaintiff's and counsel's affidavits, each of which recite that "A copy of the Complaint was served on Defendant, Sheriff Jack Heard. . . ." The affidavits do not support entry of default as neither recites that summons and complaint were served on Sheriff Heard.

(12) Rule 4(h), F.R.C.P., allows for amendment of process unless it "clearly appears that material prejudice would result to the substantial rights of the party against whom process issued." Although summons was not sought and it was not issued, Putative Defendant Sheriff Heard would show further that his rights are prejudiced should

judgment be rendered against him (or this case be continued so that summons may be issued and served on him): (1) the claim is now barred by the Texas two-year Statute of Limitations applicable to 42 U.S.C. § 1983; (2) Sheriff Heard always has been available for service of summons and complaint upon him in that he has remained in Harris County during the pendency of Plaintiff's suit; and (3) Sheriff Heard leaves the office of Sheriff of Harris County on December 31, 1984.

(13) This case should be dismissed as to Sheriff Heard pursuant to Rule 4(j), F.R.C.P., as no service was made on Sheriff Heard within the 120 days after suit was filed in September, 1983, and no good cause has been shown.

(14) Rule 4 is jurisdictionally rooted, *Ransom v. Brennan,* 437 F.2d 513, 517 (5th Cir. 1971), cert. denied 403 U.S. 904, 91 S. Ct. 2205, 29 L.Ed.2d 680. The party seeking to invoke jurisdiction of the federal court has the burden of establishing that jurisdiction exists and the burden may not be shifted to the party challenging the jurisdiction. *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483, 490 (5th Cir. 1974) and cases cited therein.

A delay between filing and service "ordinarily is to be viewed more seriously than a delay of a like period of time occurring after service of process." *Veazey v. Young's Yacht Sales & Service, Inc.,* 644 F.2d 475, 478 (5th Cir. 1981). A long delay in issuance of summons that is attributable to the Plaintiff can lead to a dismissal for failure to prosecute, under Rule 41(b). *Richardson v. United White Shipping Co.,* 38 F.R.D. 494 (D.C. Cal. 1965); Wright & Miller, 4 Fed. Prac. & Proc. § 1086.

Where there is a defect in the service of process, the court has discretion to allow the Plaintiff to re-serve the

defendant; however, "if service of a new summons would be an exercise in futility, the right to do so should be denied." *Smith v. Boyer,* 442 F.Supp. 62 (D.C. N.Y. 1977).

Where a defendant does not waive service or make an appearance, a federal court is without jurisdiction to render personal judgment against a defendant if service was not made in accordance with federal statutory or rules requirements, notwithstanding any actual notice the defendant has. *Ransom v. Brennan,* 437 F.2d at 519; *Sieg v. Karnes,* 693 F.2d 803, 807 (8th Cir. 1982).

WHEREFORE, Putative Defendant Sheriff Heard prays that Plaintiff's Motion for Entry of Default be denied in all things and that he have reasonable attorneys fees for the time expended in answering Plaintiff's motion for entry of default and this court's Order to Show Cause by written response and hearing set for December 13, 1984.

Respectfully submitted,

/s/ ANN HARDY
Ann Hardy
Assistant County Attorney
1001 Preston; Suite 634
Houston, Texas 77002
(713) 221-7869

ATTORNEY FOR PUTATIVE
DEFENDANT SHERIFF
JACK HEARD

OF COUNSEL:

MIKE DRISCOLL
Harris County Attorney

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above response was mailed, certified mail, return receipt requested, to Plaintiff's counsel, Ms. Jacqueline Taylor; 2100 Travis, Suite 1200; Houston, Texas 77002, on this the 12th day of November, 1984.

/s/ ANN HARDY
Ann Hardy
Assistant County Attorney

EXHIBIT "1", Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-83-5283

MILLICENT CURRY

v.

SHERIFF JACK HEARD, ET AL.

AFFIDAVIT OF SHERIFF JACK HEARD

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared Jack Heard, who, being by me duly sworn, stated as follows:

My name is Jack Heard. I am the elected, qualified and acting Sheriff of Harris County, Texas. I make this statement based upon my personal knowledge, which I believe is true and correct. I received a petition filed in federal cause number H-83-5283 by certified mail on September 6, 1983. No summons or other document from the federal district clerk accompanied the petition, and no other form from Plaintiff's counsel concerning service was included with the mailing. I sent the lawsuit to the County Attorney's office.

EXHIBIT "1", Page 2

I received a second copy of Plaintiff's complaint and a letter from Ms. Jacqueline Taylor, dated April 3, 1984, by certified mail. Again no district court summons or other document was included in the letter. I sent this letter and second copy to the County Attorney. I received a response from Assistant County Attorney Ann Hardy on April 11, 1984, advising me that federal district court clerk Jones told her the case had been dismissed and was closed. A copy of her letter to me is attached and incorporated by reference for all purposes.

I have received no other documents or correspondence from Plaintiff, her attorney or the court until Tuesday, October 30, 1984. At that time, I received, by certified and regular mail, the court's order to respond and to show cause at a hearing on December 13, 1984, at 9:30 a.m. before the Honorable Judge John Singleton, Jr.

/s/ JACK HEARD
Jack Heard
Sheriff of Harris County, Texas

SUBSCRIBED AND SWORN TO before me, the undersigned notary public, on this the 2nd day of November, 1984.

/s/ LENA KOZIELSKI
Notary Public in and for
The State of Texas

LENA KOZIELSKI
Printed Name

My Commission Expires
on: June 15, 1987

EXHIBIT "1", page 3

MIKE DRISCOLL
County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
713/221-5101

April 11, 1984

Sheriff Jack Heard
1301 Franklin

RE: Cause H-83-5283, *Millicent Curry v. Sheriff Jack Heard, Deputy Labove, Deputy Miller and Dr. Adams;* U.S. District Court, Southern District of Texas; Houston Division.

Dear Sheriff Heard:

This letter is in response to your letter of April 5, 1984, asking us to represent you and certain deputies in the above lawsuit. Attached to your letter was a copy of the Complaint and a letter from Ms. Jacqueline Taylor, counsel for Curry, indicating that as no answer had been filed, there was an apparent mistake or oversight. No summons or attorney-drafted proof of service came to us with your letter. As you recall, a copy of the Complaint was sent to us on September 7, 1983 (received September 9), although no summons or attorney-drafted proof of service came with that Complaint to us. On October 26, 1983, you sent over some material for use in our answer on your behalf.

Upon receipt of the September, 1983 Complaint, I called the federal docket clerk and asked if proof of service had been filed. I was advised no summons had been

issued and service had not been returned. Upon receipt of your April letter, I again called the federal docket clerk and was advised by her as follows: suit was filed on September 9, 1983, and no summons or service was requested at that time; no summons has been requested since that time; the case was dismissed on March 29, 1984 without prejudice for want of prosecution. Ms. Jones advises that the case is closed.

Therefore, we will continue to keep this case in our "pending" file until Ms. Taylor either refiles as a new suit or reinstates the case and you and your deputies are properly served.

Sincerely,

/s/ ANN HARDY
Ann Hardy
Assistant County Attorney

# APPENDIX OF FORMS

## Form 18-A.

## NOTICE AND ACKNOWLEDGMENT FOR SERVICE BY MAIL

United States District Court for the Southern District of New York

Civil Action, File Number _____

A.B., Plaintiff

v.

C.D., Defendant

Notice and Acknowledgment of Receipt of Summons and Complaint

### NOTICE

To: (insert the name and address of the person to be served.)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

_____

*Signature*

_____

*Date of Signature*

## ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

_____

*Signature*

_____

*Relationship to Entity/Authority to Receive Service of Process*

_____

*Date of Signature*

(Added Pub. L. 97-462, § 3, Jan. 12, 1983, 96 Stat. 2529, and amended Apr. 29, 1985, eff. Aug. 1, 1985.)

### Editorial Notes

Effective Date. Form 18-A effective 45 days after Jan. 12, 1983, pursuant to section 4 of Pub. L. 97-462.

Supreme Court, U.S.
FILED
OCT 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-480

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

SHERIFF JACK HEARD,
*Petitioner*

v.

MILLICENT CURRY,
*Respondent*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

GEORGE J. PARNHAM
440 Louisiana
Suite 475
Houston, Texas 77002
(713) 224-3967
*Counsel for Respondent*

JACQUELINE TAYLOR
909 Fannin #2600
Two Houston Center
Houston, Texas 77010-1003
(713) 757-0440
(Application for Admission to the Supreme Court of the United States pending)

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the failure to include a summons in the service of a complaint in a case brought under 42 U.S.C. § 1983 is a defect of service.

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Infotronics Corporation v. Varran Associates Corporation, 45 F.R.D. 91 (S.D. Tex. 1968) ..... 4
Jefferson v. Stockholders Publishing Co., 194 F.2d 291 (9th Cir. 1952) ..... 5
LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976) 4
Norlock v. City of Garland, 768 F.2d 654 (5th Cir. 1985) 4
Rigo Manufacturing Co. v. Thomas, 458 S.W.2d 180, 182 (Tex. 1970) ..... 3
Wieland v. Wickard, 4 F.R.D. 250 (E.D. Wis. 1945) ..... 3, 5
Zale Corp. v. Rosenbaum, 520 S.W.2d 889 (Tex. 1975) .. 3

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(h) ..... 3, 4, 5, 6
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TEXAS STATUTES

Vernon's Ann. Civ. St. Art. 5526 ..... 3

TREATISES

2 J. Moore, Moore's Federal Practice § 4.44, pp. 1295.52, 1295.53 ..... 4
Wright & A. Miller, Federal Practice and Procedure: Civil: § 1131 ..... 4

NO. 87-480

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

SHERIFF JACK HEARD,
*Petitioner*

v.

MILLICENT CURRY,
*Respondent*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

## COUNTERSTATEMENT OF THE CASE

This suit was filed by Plaintiff Millicent Curry on September 2, 1983 against Defendant Sheriff Jack Heard and other Defendants who are no longer a part of this action.

The complaint was timely filed and a copy of the complaint was delivered to and received by Defendant Sheriff

Heard, however, unbeknownst to Plaintiff, a summons was not forwarded to Defendant. (Res. App. A).

On March 29, 1984, an order of dismissal was filed and the case was dismissed for want of prosecution. (Pet. App. F). On April 4, 1984, Petitioner filed a Motion to Reinstate reflecting the belief that Defendant had been served. On May 9, 1984, the case was reinstated. Plaintiff notified Defendant by letter dated April 3, 1984, of Defendant's failure to answer. (Res. Ex. B). Defendant did not respond. Plaintiff filed an Application and Notice for Entry of Default on July 20, 1984. The District Court ordered the Defendant to show cause why the Court should not grant Plaintiff's motion. In response the Defendant indicated the Plaintiff failed to include a summons with the complaint. Plaintiff, realizing the omission, requested that she be permitted to amend process pursuant to Federal Rule 4(h). The District Court dismissed the complaint finding that the statute of limitations had run. Plaintiff appealed to the Court of Appeals for the Fifth Circuit arguing that the statute of limitations was tolled upon the filing of the petition and that due diligence was exercised in procuring service. The Court of Appeals agreed, vacating and remanding to the trial court. (Pet. App. B).

## REASONS FOR DENYING THE WRIT

(1) This case does not involve an important question of Federal or State Law which must be settled by this Court. This case involves a question of procedure involving the application and adaptation of the Texas tolling doctrine as developed in Texas in the context of Federal Court procedure.

Petitioner/Defendant does not dispute that under Texas law, if a Plaintiff files her lawsuit within the applicable statute of limitations, the deadline for service is tolled, so long as Plaintiff makes diligent efforts to obtain service of process. Due diligence being a question of fact. (Pet. pg. 4), *Fluor Engineers & Constructors, Inc. v. Southern Pacific Transportation Company,* 753 F.2d 444 (5th Cir. 1985); Vernon's Ann. Civ. St. Art. 5526; *Dunham v. Innerst,* 50 F.R.D. 372 (M.D. Pa. 1970).

The Texas tolling doctrine is an equitable doctrine. The statute of limitations is tolled by the filing of the Petition within the limitation period so long as the second requirement of diligence in procuring the issuance and service of citation is met. *Rigo Manufacturing Co. v. Thomas,* 458 S.W.2d 180, 182 (Tex. 1970); *Zale Corporation v. Rosenbaum,* 520 S.W.2d 889, 890 (Tex. 1975).

In the case at hand, the Petitioner/Defendant actually received a copy of the Respondent/Plaintiff's complaint. Petitioner/Defendant admits to the receipt of the complaint, not once, but two times in a letter dated April 11, 1984 (Pet. App. G, pgs. 35a, 35b). The courts have treated the receipt of the complaint as process. *Wieland v. Wickard,* 4 F.R.D. 250 (E.D. Wis. 1945).

The absence of the summons is merely a *defect in service,* which may be cured by a court permitting an issuance of a summons pursuant to Rule 4(h), F.R.C.P. *See Fluor,* 753 F.2d at 449, citing *Great Plains Crop Management, Inc. v. Tryco Manufacturing Co.,* 554 F. Supp. 1025, 1028 (D. Mont. 1983).

Rule 4(h) gives a trial court extensive discretion to allow the amendment of process unless it ". . . clearly appears that material prejudice would result to the sub-

stantial rights of the party against whom the process is issued." *See Fluor*, 753 F.2d at 450; *Dunham*, 50 F.R.D. at 374, citing *Infotronics Corporation v. Varran Associates Corporation*, 45 F.R.D. 91 (S.D. Tex. 1968); 2 J. Moore, Federal Practice, 2d ed., § 4.44, pg. 1295.52, 1295.53. *See also* Wright & Miller, Federal Practice and Procedure, Civil § 1131.

Plaintiff claims that under federal application of state law, when a suit is dismissed, the statute of limitations is not tolled, citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976); *Cardio-Medical Assoc. v. Crozier-Chester Med. Ctr.*, 721 F.2d 68, 77 (3rd Cir. 1983); *Norlock v. City of Garland*, 768 F.2d 654 (5th Cir. 1985). However, each of these cases are Rule 4(j) F.R.C.P. "dismissal cases" wherein the appellants are asking for relief from a court's denial of their respective motions to reinstate. This is not the issue in this case. Respondent/Plaintiff's Motion to Reinstate was *granted*. A reinstatement of an action operates to place the action in the same position as if an order to dismiss was never entered. *See Childs v. Mayo*, 73 Tex. 76, 11 S.W. 154 (1889); *Cotton v. Lyter*, 81 Tex. 10, 16 S.W. 553 (1891).

Yet Petitioner/Defendant persists in arguing that this case is a Rule 4(j) F.R.C.P. dismissal case rather than a Rule 4(h) F.R.C.P. amendment of process case by continuing to raise the question of good cause or good faith. However, those questions are not before the trial court because the court had already addressed those issues when it reinstated Respondent/Plaintiff's case. Therefore, the only issue that should have been before the Trial Court was whether or not it would permit a Rule 4(h) amendment to cure a defect in service.

(2) The Court of Appeals decision in the present case is not in conflict with any other circuit or Texas law. The present decision correctly holds that there has been a defect of service which will now require the Federal Court's consideration of Respondent's Motion for Rule 4(h) amendment. *Fluor,* 753 F.2d at 449. A hearing on Respondent's Motion for Rule 4(h) amendment will permit the Trial Court to consider those factors which have not yet been addressed, i.e. whether or not an amendment would result in material prejudice to the substantial rights of the party against whom the process is issued; *Fluor,* 753 F.2d at 450; whether it would be an exercise in futility, *Wieland,* 4 F.R.D. 250; and whether or not Respondent/Plaintiff is correcting an error or mistake or is guilty of dilatory tactics. *See Wieland,* 4 F.R.D. at 253; *See also Jefferson v. Stockholders Publishing Co.,* 194 F.2d 291 (9th Cir. 1952); *H. Alpers & Association v. Omega Precision Hand Tools, Inc.,* 62 F.R.D. 408 (D.C. Pa. 1974). It must be noted in response to the Petitioner's arguments that the mere passage of time does not by itself indicate lack of due diligence. This is a question of fact which the Federal Court never reached or considered.

Finally, the present decision in no way abrogates the 120 day service provision in Rule 4. On the contrary, the present decision adopts the purpose and intent of Rule 4—actual notice. Actual notice is the goal of the rule relating to service of summons. The absence of a summons is merely a *defect* in service, which may be cured by permitting a Rule 4(h) amendment. *Fluor,* 753 F.2d 444, 449 (5th Cir. 1985) citing *Great Plains Crop Management, Inc.,* 554 F.Supp. 1025, 1028. Rule 4 is to be read in a manner which effectuates its function

of timely notice *without creating technical traps for the unwary. Fluor,* 753 F.2d at 449, (emphasis added).

Petitioner/Defendant argues that Respondent/Plaintiff under these facts could take a default without affording Defendant his due process "day in court". However, nothing could be further from the truth—all that is requested is a 4(h) amendment to cure a service defect, which would provide all parties with their "day in court".

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Counsel of Record for Plaintiff/Respondent, Millicent Curry*

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(713) 757-0440

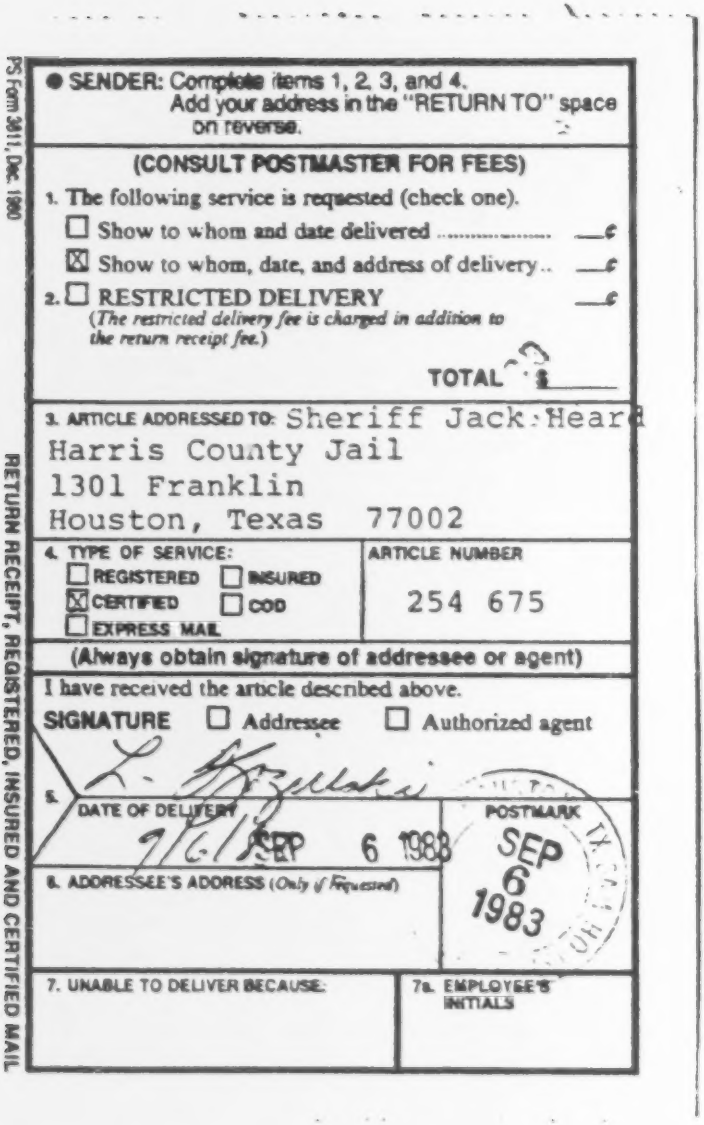
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief in Opposition was sent to all interested parties in this case by U.S. Certified Mail, Return Receipt Requested on this the _____ day of October, 1987.

_____

GEORGE J. PARNHAM

# APPENDIX A



PS Form 3811, Dec. 1980

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
- ☐ Show to whom and date delivered ..... ¢
- ☒ Show to whom, date, and address of delivery.. ¢
2. ☐ RESTRICTED DELIVERY ¢
(*The restricted delivery fee is charged in addition to the return receipt fee.*)

TOTAL $

3. ARTICLE ADDRESSED TO:
Sheriff Jack Heard
Harris County Jail
1301 Franklin
Houston, Texas 77002

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
254 675

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

L. Kozlaski

5. DATE OF DELIVERY
9/6/83 SEP 6 1983

POSTMARK
SEP 6 1983

6. ADDRESSEE'S ADDRESS (*Only if Requested*)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

## APPENDIX B

April 3, 1984

Sheriff Jack Heard
Harris County Jail
1301 Franklin
Houston, TX 77002

RE: Millicent Curry v.
Sheriff Jack Heard, et al

Dear Sir:

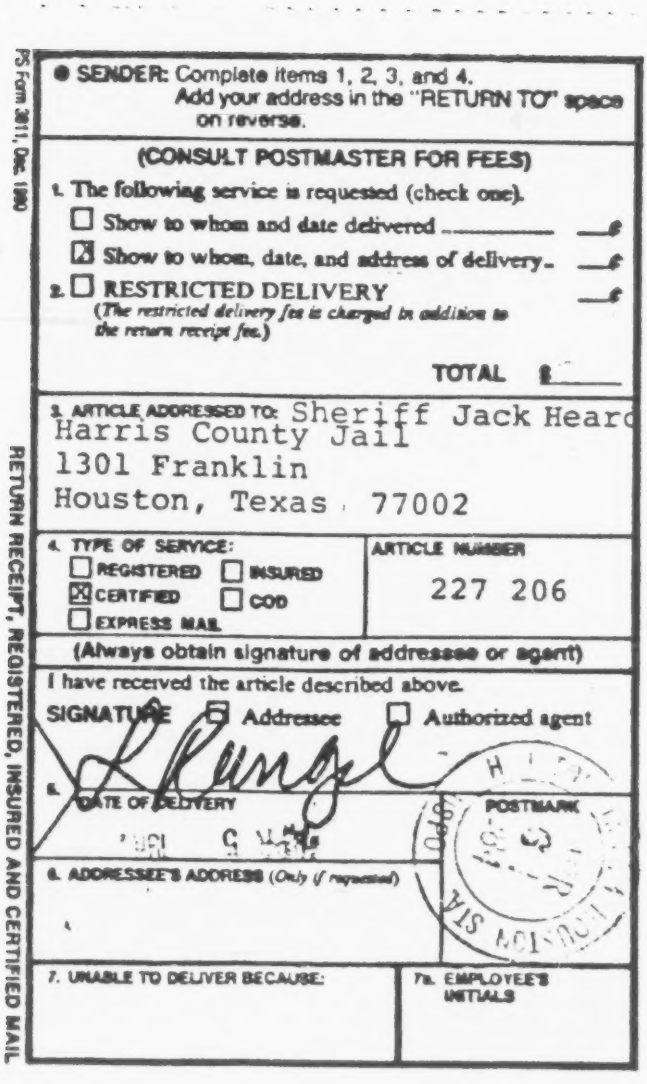
Enclosed please find another copy of the Complaint filed in Civil Action H-83-5283. No answer has been filed at this time and we believe it is merely as the result of a mistake or inadvertence on the part of your office. Please let us know if you intend to answer or if we must proceed with a default judgment.

Thank you for your attention in this matter.

Sincerely,

Jacqueline Taylor

JT/ml
Enclosure



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- ☒ Show to whom, date, and address of delivery.. ¢
2. ☐ RESTRICTED DELIVERY ¢
(*The restricted delivery fee is charged in addition to the return receipt fee.*)

TOTAL $

3. ARTICLE ADDRESSED TO: Sheriff Jack Hearc
Harris County Jail
1301 Franklin
Houston, Texas 77002

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
227 206

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

5. DATE OF DELIVERY

POSTMARK

6. ADDRESSEE'S ADDRESS (*Only if requested*)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL